

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

Original
with affidavit of Service

77-6093

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P/S

In The
United States Court of Appeals
For The Second Circuit

WINIFRED D. MORIO, Regional Director,
Region 2 of the National Labor Relations Board,
for and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Appellee,

-against-

LOCAL 456, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

Appellant

*On Appeal from the United States District Court for the Southern
District of New York.*

BRIEF IN BEHALF OF APPELLANT

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
WINIFRED D. MORIO, Regional Director,
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Board, for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner - Appellee

- against -

LOCAL 456, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,

Respondent - Appellant
-----X

RESPONDENT - APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

The instant Appeal is from an Order of Judge John M. Cannella, dated June 6, 1977 (A-38), based upon a Decision dated May 26, 1977 (A-31-36).

STATEMENT OF ISSUES

The first question presented is whether or not the Court below was in error in determining that discussions held between the Union and Construction City, the Employer, at one meeting, solely in the context of whether or not area standards were paid, at which all conversations were prefixed by an absolute disclaimer of a recognitional picketing purpose, caused an area standards picket line, of seven months duration, previously determined by the NLRB, repetitively to be properly an area standards picket line, to become, in that

one instant, a recognitional picket line, because, in the context of discussing the payment of area standards, the Union referred to paragraphs of the industry contract. What was said is not in dispute. (A-76-81).

The second question is whether, without amending the Employer's charge, dated April 26, 1977 (A-10), which was the predicate for the complaint, and which was a verbatim duplicate of the earlier dismissal charge (A-20,21), (except as to a concededly irrelevant last sentence), could sustain a complaint, which alleged conversations held between the parties after the charges and on May 4, 1977, it being the Union's contention that the charge of April 26 was the predicate of and must be the limitation of the complaint.

The third question is whether or not the Court below erred in declining to reopen the hearing, requested to do so by the Union (A-88), because in a desire to comply with the Court's request to expedite the proceeding (A-38, 42, 43) and having successfully disproven payment by the Employer of area standards, the issue being litigated at the hearing, the Union rested (A-58-75, Exhibit 2); when, after the close of the hearing, the NLRB abandoned any claim of payment of area standards, and sought the injunction solely by reason of the Union's reference to the industry contract paragraphs. The Court made its Decision and issued its Order on this sole predicate. The Union was thus precluded from rebutting these contentions and other procedural errors of the NLRB by affirmative testimony.

STATEMENT OF THE CASE

The industry contract was negotiated to be effective July 1, 1976 (Ex. 5), and thereafter, on October 26, 1976, the Union began area standards picketing with a sign stating (A-13):

"Local 456 protests substandard wages and conditions being paid on this job"

Hereafter, under date of November 1976, the first of several charges was filed against Local 456 (A-20). While such charge alleged the object of picketing was "recognitional", not one scintilla of proof was ever produced in the total record in support of such charge. In fact, under date of December 27, 1976, the Regional NLRB refused to issue a complaint, stating in pertinent part: (A-21)

"Rather it appears that the Union was engaged in picketing at your facilities in furtherance of its object of maintaining standard area wages and working conditions, and not for the object of either obtaining initial recognition or organizing your employees. In this connection it appears, from the investigation, that the Union was generally aware, prior to the commencement of its picketing, that the wages and working conditions of your employees do not, in fact, meet the standards prevailing in Union shops in the area."

Thus, after more than two months of picketing, the Regional Office itself, after investigation, found that the Union was aware of the sub-standard conditions and was maintaining a very legitimate area standards picket line and was not conducting a recognitional picket line or seeking to organize the employees.

Further, in respect to this charge and charge 2CC-1470, Counsel for the Union, by letter dated November 28, 1976 (A-25), advised the Region as follows:

"Considerable legal study preceded Counsel's advice to the Union that an area standards picket line could be established with all officers instructed as to its legal purpose and the limitations placed upon that form of picketing.

The Union was advised that the picketing was not designed to be a recognitional picket line.

On January 5, 1977 another charge was filed (2CC-1477).

Then by letter dated March 4, 1977, the NLRB denied all appeals (2CC-1470, 2CC-1477, 2CP-563) (A-23).

Thus, more than four months after the picketing had started the National Labor Relations Board itself, in denying the appeals in all then pending cases, gave its stamp of approval to the conclusion that the Union was conducting a very legitimate "area standards picketing".

Finally, under date of April 26, 1977, some five months after the legitimate area standards picketing began, the Employer filed an identical charge against the Union, except for one last sentence to be noted (A-10). This charge is a verbatim copy of the earlier charge, already insufficient to support a complaint as determined by the NLRB. That earlier charge was 2CP-563, and as already stated, the Regional Office and the NLRB found against such charge and specifically determined that, based upon the very same language, the Union was in fact conducting a very legitimate area standards picket line.

Thus, some five months later, the only new element charged against the Union, and none other, was the following additional language, of the instant charge (A-10):

"The above-named labor organization has refused offer by Employer to examine its (Employer's) compensation package."

This latter language was clearly false and no evidence was ever produced by the NLRB, nor could it have obtained a truthful statement from the Employer that the Union had refused to meet to compare the economic package (A-27, 28, 30). Thus, at no time had the Union refused to meet to compare its economic package, and, in fact, the offer of the Employer to meet was improperly conditioned upon the Union discontinuing the picketing (A-28), which the Union ignored anyway, and met anyway.

So patently false was this charge that it was quickly dropped at the 10(1) proceedings (A-77).

It is most important to observe that the instant charge, the predicate of the complaint, contained not one allegation of the Union converting its pre-established legitimate area standards picket line to a recognition picket line by making comparisons, paragraph-by-paragraph, to the industry contract, nor could such charge have been made under date of April 26, 1977, since, obviously, such date pre-dates the meeting of May 4, 1977.

Thus, the Union was never charged by the Employer for the offense which has become the crux of the case.

Yet, despite this fatal procedural defect, the NLRB at the 10(1) hearing exclusively makes issue of whether or not a comparable economic package was paid (A-46-75) and makes no contention concerning the claimed illegality of comparing paragraph-by-paragraph as the touchstone for a change of posture, to allege that this was the sole reason for contending that an area standards picket line was diverted to a recognitional picket line (A-49-75). Yet, in the NLRB Post-Hearing Memorandum, Regional Counsel stated, "Petitioner will therefore not clutter this Memorandum with cost comparisons."⁽¹⁾

Thus, there was first the language of the first charge, already dismissed, repeated in the instant charge; then there was a false charge of refusal to meet, quickly abandoned; then there was the major thrust at the 10(1) hearing, made a part of the instant case, the contention that the Employer was paying area standards; and when, in the context of this latter contention, the Union argued the paragraphs of the industry contract against the contention that area standards were paid, then the NLRB drops the contention that area standards were paid and completely out of context seeks to predicate its whole case on a contention that using paragraph-by-paragraph contract comparisons for the purpose of disputing the legitimacy of the area standards package, and particularly the legitimacy of a "pension plan (?)" revokable at the will of the Board of Directors, the Regional Office wishes to hold the Union out of context, as claiming that it sought recognition.

(1) not in record on appeal but quoted exactly from Region's Supplemental Memorandum, dated May 17, 1977

Thus, what appears to be a graciousness of the Regional Office in dropping charges of refusal to meet, and ignoring charges of picketing in the face of payment of area standards, is a very astute effort by the Regional Office to take out of context, for its own purpose, the Union's reference to the paragraphs of the contract, so that the Regional Office may stand on such references as an isolated incident to bring its case within the cases dealing with separate and particular efforts of Unions to, in fact, gain recognition by specific reference to the paragraphs of the industry contract, coupled with a request that the Employer adopt the paragraphs and the industry contract. Thus, what appears to be graciousness is truly astuteness.

Nevertheless, despite this astuteness, and despite the procedural defects, the Union wishes to keep in context the reference to the paragraph-by-paragraph of the contract in an exclusive relation to the contentions of the payment of area standards as any fair reading of the record in this case will illustrate.

It is not disputed that the May 4, 1977 meeting was called solely to discuss whether an equal economic package was being paid (A-27).

It is further not disputed that at the outset of the conference the Union made it clear that it was not seeking recognition (A-79):

"Both Mr. Harold and Mr. Revellese said at one point early in the conversation that they weren't looking for recognition. They insisted upon that, Mr. Harold very emphatically."

The supposed predicate of an equal economic package was a then very recently adopted corporate plan (A-79 Ex-2), but, although the Union representatives asked for a copy, the Company would not give it to them (A-80).

It must be concluded that not only was all the conversation at the meeting related to the payment of an equal economic package (A-27), but all conversations concerning the paragraph-by-paragraph reference to the industry contract were directly related to the economic costs or the true evaluation of the corporate plan, the keystone of the Company's new contention that it was paying an equal economic package (A-78-81). It is inconceivable that any contention can be made that the references to the industry contract's paragraphs were made in any other context but in the discussion of the only matters being discussed at the conference, -- that is, whether or not there was an equal economic package.

Thus, the statement, "unless you make this contract term-for-term, then you are not meeting area standards" (A-79), by the very language itself, was obviously related to area standards.

Thus, reference to seniority and to lay-off paragraphs (A-79) were contextually and physically inter-related to the payment of the economic package, and the worth of the Board of Directors plan.

Indicative of this inter-relation came Mr. McDonough's answer on cross-examination; for instance, he said, (A-80-81):

"I explained that the company did not know whether or not they wanted to go through all that. I have seen other plans that received IRS approval that

were 75 pages long. We are talking about a plan for three people. I said, 'the company may find something else to do with the money'. It is an incredible procedure to get IRS approval."

Question: "Would it be fair to say that our response concerning item-for-item came after, in point of time, your assertions that you met welfare and pension and supplemental benefits by reason of the Board of Directors resolution?"

Answer: "Yes"

The instinctive reaction of the Union to the corporate plan, a copy of which was denied them, by making paragraph-by-paragraph reference to the industry contract, is well justified, as indicated in the cross-examination of Mr. Zaccaria, a corporate officer. For instance:

There is no trust instrument; it has not been submitted to the IRS; no plan is formulated yet; the plan is irrevocable, yet the Board of Directors have the power to change the plan by resolution; the money is in a special account, not a savings account, a checking account without interest; no payment for probationary employees, -- i.e. six-month trainees, and payment is made for only two of the three employees (A-50, 69-72).

It is small wonder that such a fabricated plan of then very recent date caused the Union to cross-reference the plan to the many, many paragraphs of the contract dealing with the economic worth of the industry contract and, more specifically, to the qualifications and eligibility for payments under the welfare, pension and supplemental benefit funds, Taft-Hartley trust funds of the Union where the money is irrevocably in trust, and Employer and Union Trustees guard it under payment of penalty for any breach of their fiduciary responsibility. So, too, all employees upon the first date of their employment are covered, and the Employer must pay into the Fund an hourly rate for each employee for all of these plans (Ex-5)

Again, in respect to the fabricated plan, it may be noted again:

"The Company may find something else to do with the money." (A-80).

It should be also factually noted that the whole context of the 10(1) hearing was in relation to the payment of a claimed equal economic package, and in order to accommodate the Court's request to expedite the proceeding, and the Union truly and justifiably believing that the thrust of the Region case was the claimed payment of an equal economic package, as the record clearly indicates, the Union rested, without making the full record it could have, if it were aware that the Region would abandon the claim of equal economic package and change the whole posture to the Union references to paragraphs of the Industry contract.

It may finally be noted that the Affirmative Defense alleges in paragraph 15 (A-15), and undisputed by the Region, that the Union offered:

" -- and that if the Employer would commit itself to an equivalent package, in being, providing equivalent but not necessarily identical benefits, from a cost point of view, the picketing would cease."

ARGUMENT

Summary

- A. The NLRB's claimed violation of the law was outside the charge.
- B. The context and purpose of the May 4 meeting could only relate to the payment of "area standards".
- C. Independent of the area standards meeting, there was not one scintilla of proof that the purpose of the picketing was for recognition, and so the NLRB had repetitively here determined as a matter of fact and law.
- D. The continuing change of position by the NLRB mixed with the desire of the Union to accommodate the Court's expressed desire to expedite the hearing below worked to the prejudice of the Union.
- E. An area standards picket line is a protected activity, and the loss of this legal right should rest on specific independent proof destructive of the established Union intent.

A R G U M E N T

A. THE NLRB'S CLAIMED VIOLATION OF LAW
WAS OUTSIDE THE CHARGE

As noted, the instant CP-577 charge (A-10) was identical to charge CP-563 (A-21) except as to the allegation of refusal to meet to examine the economic package, an allegation absolutely untrue (A-27, 28, 30) and later dropped (A-77)..

Since dropping the charge of refusal to meet, the instant charge had already been determined to not warrant the issuance of a complaint. (A-21)

Hence there was then no sustainable charge to warrant the issuance of a complaint.

Yet, again, the Region would graft on to the April 26, 1977 charge the proof of claimed payment of an equal economic package supposedly supported by the conversations at the later meeting of May 4, 1977 (A-58-75). This claim, failing in proof, was also abandoned by the Region (pg. 6 ante).

Seemingly then dragging out of the embers of its debacle, the Region reformed its troops and sought to reconstruct out of these embers a really new charge that the conversations in the context of the refutation of the value of the economic package, could stand alone and be the crux of the Region's case. But such could not have been part of the April 26, 1977 charge and was not advanced at all at the 10(1) hearing of May 11, 1977.

Obviously, such could not be the case because the public predicate of its complaint as stated in its complaint was paragraph 3 thereof which incorporated the charge of April 26, 1977 (A-5).

Obviously any proof against the Union for converting an area standards picket line to a recognitional one by reference to paragraphs of the industry contract could not have been within the meaning of such charge on April 26, 1977.

The Region -- competent yes! -- clairvoyant no!

The Region must stand by its complaint and the complaint can only stand by its referenced charge and only by events that could have been provably in being at the time of the charge.

In effect, the Region is playing a super Conan Doyle in assuming that because the Union referred to industry contract paragraphs on May 4, it had the intent all along to conduct a recognitional picket line in the guise of an area standards picket line, despite the fact that the Region itself had already determined the Union's intent, purpose and object, and the NLRB had sustained such a conclusion.

It is respectfully submitted that due process is not reformed out of events that followed the charge, the predicate of the complaint.

It is respectfully submitted that the Region is procedurally in error and that the complaint, in its present context as advanced by the NLRB, should be dismissed or at least not stand as a support for a 10(1) injunction.

B. THE CONTEXT OF PARAGRAPH-BY-PARAGRAPH
REFERENCE WAS ALWAYS IN REFERENCE TO THE
OPEN QUESTION OF PAYING AREA STANDARDS,
NOT IN A DISGUISED ATTEMPT TO HAVE THE
EMPLOYER ADOPT THE INDUSTRY CONTRACT

It is understandable that the NLRB should review a permissible area standards picket line against additional facts supportive of a true claim for recognition.

But recognition has a precise meaning in the labor law. For an Employer to recognize a Union it must satisfy itself that, in fact, the Union truly represents the employees in an appropriate unit. The NLRB has many methods of being certain that the employees have, in fact, authorized the Union to represent them, and has many available tools to prevent false claims of representation, with penalties on both the erring Employer and the Union.

Thus, it is submitted that the NLRB, in finding an area standards picket line is a front for recognition, must also find the Union has legitimate authority to claim representation authority.

How can any discussion of industry contract contents be found, in any context, a legitimate claim for recognition, unless there is evidence to also find employee representation authority?

Isn't what the NLRB is really trying to say is that the Union, through the guise of an area standards picket line, is forcing the Employer to recognize the Union?

Thus, frankly, the instant Union disputes the NLRB's general conclusion that, even in some instances, a picket line can be for recognition without representation authority.

Thus it submits that the destructive proof, against a fake area standards picket line, are facts of efforts to organize the employees at the same time, proof completely absent in the instant case.

Nevertheless, since the NLRB has held that some area standards picket line cases are fronts for recognition, without any proof of a claim of representation, it is incumbent upon the Union to distinguish the instant case, keeping in mind, however, that the claimed rationale of cited cases is a finding that recognition was the Union's true purpose.

Thus, in the instant case, unlike any other cited or known case, the Region had previously determined, after investigation, that an area standards picket line was in being and continued in being. Thus, any claimed recognitional picketing intent cannot relate back in point of time. (A-21, pg.-3 ante)

Even the charge of refusal to meet to analyze the claimed equal economic package was false and dropped. (A-77, pg.-5, ante)

Thus, assuming the Region survives the challenge in A, unlike other cases, the claim of recognitional picketing can only begin at the meeting of May 4, 1977, and then wholly in the context of that meeting.

So, too, the conversations of that meeting were concededly preceded by an absolute disclaimer of any recognitional object. Whether the Company agrees or not, it is submitted all conversations at that meeting had as a prefix such disclaimer. There was not one bit of conversation destructive of that disclaimer. The whole record, for seven months, is absolutely pure of any proof destructive of such disclaimer. (A-79, pg. 7, ante)

Thus, the conversations of this meeting, unlike other cases, have (1) a Regional determination of a legitimate area standards picket line, (2) a disclaimer made in exact point and time of any supposed recognition claim, against which to view any paragraph-by-paragraph reference to the industry contract.

Of the many, many cases that could be cited, holding an area standards picket line a front for recognitional picketing, all permitted the Law Judge or NLRB to make a presumption against the Union, but only as a presumption because of specific Union conduct, claimed to warrant the presumption.

In the instant case, it is submitted the Court disregarded and ignored the two protective predicates in indulging in a presumption that a reference, paragraph-by-paragraph, to the industry contract was a disguised claim for recognition. Usually presumptions may be made to fill a void, but not to destroy affirmative proof.

Finally, the paragraph-by-paragraph reference should be viewed in the full context of the meeting and the many paragraphs of the industry contract with economic relevance.

The keystone was the new corporate resolution supposedly creating a substantial part of the claimed equal economic package.

Yet, as has been set forth, the true current requirement to meet comparable costs, as referenced in the industry contract paragraphs, were relevant in reference to the Company Resolution (Exh. 2).

Thus, only two out of the three employees were covered, and new employees had to be employed six months. The industry contract requires payment for hours worked for all unit employees, without any probationary employment.

So, also, a reference to seniority and lay-off had cost significance because under the Company plan any employee could be laid off, seniority ignored and \$75 per week saved. So, also,

lay-off and seniority had cost significance because of a forty-week guarantee of employment (Ex. 9, Art. III, Sec. 6).

The reference to meeting the contract term-for-term was in terms of meeting area standards, not in terms of wanting non-economic conditions for the employees.

Frankly, all the conversation was made against the refusal to give the Union a copy of the Resolution (A-80) the Employer's attorney's statement that the company might do something else with the money (A-80), proper suspicions concerning its worth, later substantiated at the 10(1) cross-examination of Mr. Zaccaria, which showed how fabricated the "plan" truly was (A-69-72).

Thus, it is respectfully submitted that, with the two predicates previously mentioned, and totally in the context of the instant case, and the Board resolution, no presumption should be made from such conversations that the Union was truly seeking recognition, rather than conducting and intending to conduct a legal area standards picket line.

C. INDEPENDENT OF THE AREA STANDARDS MEETING
OF MAY 4, THERE WAS NO EVIDENCE WHATSOEVER
OF ANY EFFORT OF THE UNION TO SEEK RECOGNITION.
IN FACT, TO THE CONTRARY, THE NLRB HAD DETER-
MINED THREE TIMES OVER A SEVEN-MONTH PERIOD
THAT THE PICKETING WAS A LEGITIMATE AREA
STANDARDS PICKETING

As set forth in (B) above, it is fair to conclude that any conversations at the May 4 meeting, in its full context, and in face of a disclaimer, and in light of the purpose for calling such a meeting, could only relate to area standards.

Independent of that meeting, neither the NLRB nor the Employer advanced one instance over a seven-month period, where the Union directly or indirectly sought recognition.

While it is recognized, as stated, that the Union could intend one purpose and pretend another, such a subjective conclusion should not support an injunction. To repeat, outside the conversations held in the context of whether or not the Employer met area standards, no presumption could be made, in the fact of the record in this case that the real purpose was for recognition. The real purpose, from beginning to end, was to conduct an area standards picket line.

D. THE CONTINUING CHANGE OF POSITION BY THE
NLRB MIXED WITH THE DESIRE OF THE UNION TO
ACCOMMODATE THE COURT'S EXPRESSED DESIRE
TO EXPEDITE THE HEARING BELOW WORKED TO
THE PREJUDICE OF THE UNION

It is respectfully submitted that the Court should appreciate that the NLRB first determined that a proper area standards picket line was being conducted, and the NLRB in Washington sustained such a conclusion in the face of three specific charges by the Employer. Then the NLRB charged a refusal to meet that fell by the wayside. Then the NLRB charged that the Employer paid an equal economic package and then dropped that contention. Finally, after the record was closed and the Union had rested, assuming the NLRB meant to stand on the contention that an equal economic package was being paid, the NLRB changed its position and dug out of the record, and out of context, a claim that the reference to the paragraph-by-paragraph of the contract was independent

proof of a true desire to seek recognition. It is not unreasonable for the Union to ask this Court to believe that the Union accommodated the Court below in the belief that it had met the issue of the hearing on the question of whether or not an equal economic package was being paid, and, therefore, rested, satisfied that it had won the day. If, in fact, the NLRB had then and there chosen to make its after-thought the major premise of its evidence at the hearing, then the Union would not have rested, but would have submitted affirmative proof to rebut such a presumption.

It is respectfully submitted that this changing position of the NLRB and particularly the change of the position after the hearing had closed and after the Union had rested, was in prejudice to the Union.

E. AN AREA STANDARDS PICKET LINE IS A PROTECTED ACTIVITY, AND THE LOSS OF THIS LEGAL RIGHT SHOULD REST ON SPECIFIC INDEPENDENT PROOF DESTRUCTIVE OF THE ESTABLISHED UNION INTENT

POINT I

AN AREA STANDARDS PICKET LINE IS A PROTECTED ACTIVITY. THE COURT ITSELF DETERMINES WHETHER THE PETITIONER HAD REASONABLE CAUSE TO BELIEVE THE STATUTE HAS BEEN VIOLATED. GENERAL PRINCIPLES OF CAUTIOUS RESTRAINT AGAINST ISSUING TEMPORARY INJUNCTIONS EVEN IN A 10(1) CASE STILL PREVAIL.

In the Second Circuit United States Court of Appeals, case of Danielson vs. Garment Workers, 494 Fed 2d 1230 (1975), (85 LRRM 2909), the Circuit Court discussed at some length the general principles guiding Courts in the grant of temporary injunctions in labor matters, and specifically in 10(1) proceedings.

The Court in that case, at page 1240, stated:

"A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any or all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."

Again, at page 1241 of the above case, the Court stated:

"Our inquiry thus becomes whether, in enacting Section 10(1), Congress made such 'unequivocal statement of its purpose' as to compel the court of equity to issue an injunction pending a decision by the board on an unfair labor practice charge... 'Reasonable cause to believe', a phrase often used in the law, is not generally satisfied by so modest a showing as is here claimed to suffice. And saying that the District Court shall having jurisdiction to grant such injunctive relief would be a strange way of declaring that it must do so even when it is convinced that no violation of law has occurred."

Again, on page 1242 of the above case, the Court stated:

"When the question is viewed from the time frame of 1947, it seems particularly unlikely that Congress would have wished the Courts to act so freely in granting injunctions theretofore forbidden in Section 4 of the Norris-LaGuardia Act of 1932, 29 U.S.C. Section 140."

See also McLeod v. Chefs, Cooks, Pastry Cooks and Assistants, Local 89, 260 Fed 2d 760; Sachs v. Plumbers Local Union #5, District Court, District of Columbia, 1969, 307 F. Supp. 190.

It is respectfully submitted that the Court has the right, the power and the duty to review the totality of the record in this case to see whether the drastic remedy of the grant of a temporary injunction is justified.

The same cases may be cited in support of the proposition that an area standards picket line is a permissible protected activity.

POINT II

AN AREA STANDARDS PICKET LINE CAN BE A
PRETEXT FOR A DEMAND FOR RECOGNITION.

The NLRB and the Courts have carefully scrutinized claimed area standard picket lines to determine whether in fact such picketing is truly a pretext to compel recognition. Each case, however, is judged by the NLRB and the Courts on its own particular fact situation.

Obviously those cases where there is a paragraph by paragraph reference to the industry contract, coupled with a demand for recognition or a demand that the employer sign such a contract may reasonably be construed as an effort to gain recognition and not an area standards picket line.

In *Hendrix vs. Laborers*, 415 Fed. Supp. 730, (92 LRRM 2976), a District Court found that the contract forwarded to the Employer together with a covering letter indicated an intention that the Employer should comply with all contract conditions, so that acquiescence in the contract, therefore, created de facto representation, a factor not found in the instant case.

So also other factors may point to pretext and pretense. Thus in the case of *Automotive Employees* case, 208 NLRB 679 (85 LRRM 1141), it was found that the Union failed to comply with the Employer's request for information concerning alleged substandard labor costs, and that the Union's own demand for information contained a request for irrelevant facts.

In the *Sales Delivery Drivers* case, 205 NLRB 462, (84 LRRM 1221) the Board found that the initial effort to determine comparable standards was sketchy and inadequate and that the Union emphasized contract coverage rather than area standards, and failed to honor the Employer's request to illustrate the cost of area standards.

In the case of *Local 492, Carpenters' Union*, 215 NLRB 263 (88 LRRM 1468), the Board found that the Union made no effort to ascertain the Employer's actual wages and fringe benefits, and the Union conceded it wanted non-economic terms of an area contract. Here the Union was clear in its direct demand for a full industry contract.

In the case of Local 475 Carpenter's Union, 178 NLRB 684, (72 LREM 1212), the Board found that the Union did not investigate area standards and did not wait for a reply to letters asking for such information, and the Union clearly and in direct context conceded that it wanted a contract that met non-economic terms, too.

POINT III

THE INSTANT CASE IS CLEARLY DISTINGUISHABLE FROM THOSE CASES IN WHICH THE NLRB OR THE COURTS HAVE FOUND THAT A CLAIMED AREA STANDARDS PICKET LINE WAS A PRETEXT FOR A RECOGNITIONAL PICKET LINE.

The instant case is clearly distinguishable from any other case that can be cited holding to the principle that an area standards picket line was a pretext for a recognition picket line.

(1.) The NLRB in the instant case, after investigation, determined that an area standards picket line was in fact, in being, and had been so without dispute for all of its term until the one meeting of May 4th. In fact the NLRB had in three (3) instances refused to issue a Complaint on charges alleging a recognition picket line.

(2.) The meeting of May 4th was called wholly to discuss area standards.

(3.) The conversation at the May 4th meeting concededly began with an absolute and clear disclaimer by the Union that it wanted recognition and every word of the conversation was centered upon and related to the sole question of whether or

not area standards was being paid.

(4.) Even though references were made to the paragraphs of the industry contract, such reference was directly and only related to the analysis of the worth and weight of the claim that area standards were being paid. At no time was such reference in any way related to a demand for recognition nor did the Union at any time ask the Employer to execute such an agreement, but only to measure the worth of its economic package against a reference to the paragraphs of the industry contract. As was illustrated, even clauses of the contract relating to seniority and layoff had a direct impact on the economic costs of the questionable proposed pension fund.

(5.) The hearing was solely related to the payment of area standards and only after the close of the hearing did the Regional Office of the NLRB drop a claim of an equal economic package and then and only then make a claim of recognition by reference to the paragraphs of the industry contract. The Regional Office, in truth, lifted out of context the reference to the paragraphs of the industry contract and endeavored to portray this reference to be an effort by the Union to seek recognition.

(6.) The Regional Office grafted onto the basic charge dated April 26, 1977, acts that occurred after and on May 4th without amending the charge. Such failure to amend is a fatal procedural defect.

CONCLUSION

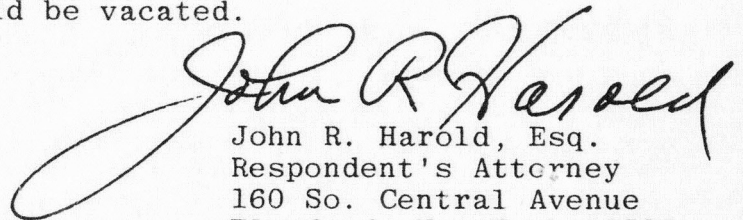
1. The Union's picket line was from start to finish an area standards picket line.

2. Any conversations of the May 4th meeting were in the context of cost comparisons, prefixed by a specific disclaimer of recognition.

3. There was no demand at any time by the Union, directly or indirectly, for recognition.

4. The injunction should be vacated.

Dated: July 9, 1977


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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No. 77 - 6093

WINIFRED D. MORIO, et al.,

Appellee-Petitioner

~~Plaintiff~~

against

AFFIDAVIT OF SERVICE
BY MAIL

LOCAL 456, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMAN, AND
HELPERS OF AMERICA, Appellant- Respondent

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
1212 Ocean Avenue., Brooklyn, New york 11230

That on the 11 day of July 1977 deponent served the annexed
BRIEF ON BEHALF OF APPELLANT and Joint Appendix
on Joseph E. Mayer and Jasper C. Brown, Jr., Esqs.
attorney(s) for National Labor Rlations Board
in this action at Office of the General Counsel, 1717 Pennsylvania Ave., Wash. D. C. 20570
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care
and custody of the United States post office department within the State of New York.

Sworn to before me

this 11 day of

JULY

1977

DAVID FINKELSTEIN

The name signed must be printed beneath

LYNNE LIEBERMAN
Notary Public, State of New York
No. 24-603713
Qualified in Kings County
Commission Expires March 30, 1979

LYNNE LIEBERMAN
Notary Public, State of New York
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